**U.S. Department of Labor**

**Board of Alien Labor Certification Appeals**
**800 K Street, NW, Suite 400-N**
**Washington, D.C. 20001-8002**

Date: April 28, 1998

Case No.: 97 INA 252

In the Matter of

**D. J. KNIGHT &COMPANY, INC.,**
Employer

in behalf of

**MU-PING TSENG,**
Alien

Appearance: R. H. Fantal, Esq., of New York, New York

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

# DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MU-PING TSENG ("Alien") by D. J. KNIGHT &COMPANY, INC., ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at New York, New York, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

*Statutory Authority*. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

## STATEMENT OF THE CASE

On October 25, 1994, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Accountant" in the Employer's Commercial Real Estate Company. AF 20. The position was classified as an Accountant under DOT Occupational Code No. 160.162-018.[2] The Employer described the job duties as follows:

> Employee will have responsibility for providing professional accounting services to the employer's company, including the preparation of financial statements, balance sheets, consolidated, division and individual balance sheets as well as the preparation of profits and loss statements. Employee will provide financial analysis of the employer's operating expenses, etc. Employee will prepare and assist in the preparation of Federal, State and local tax returns for the employer's company as well as all other financially related filings.

The minimum education, training and experience for a worker to perform satisfactorily the job duties described in Item 13 of ETA Form 750A was four years of college leading to a baccalaureate degree in accounting plus two years of experience in the Job Offered. The other Special Requirement was

> Fluency in the Chinese language required.

AF 20.[3] The Alien, a national of Taiwan in the Republic of China, graduated from a Texas state university school where she was awarded the graduate degree of Master of Business Administration after attending from June 1988 to December 1989. From this it is inferred that she duly completed four undergraduate years of college and qualified with the requisite baccalaureate degree before her admission to this graduate program. The Alien did not initially state her employment after the end of 1989 in the ETA Form 750B, but simply described her April 1994 hiring by the Employer for which she worked as an Accountant until the date of application while performing duties stated in Item 13 of ETA Form 750A. AF 03. In a corrected version, however, the Alien indicated that from August 1991 to March 1994 she worked for a Houston, Texas, International Energy Development Company, where she also performed the duties set out in Item

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The hours were 9:00 to 5:00 in a forty hour week at $41,800 per year.

13 of ETA Form 750A. AF 08-09, 13-15.[4]

After this position was advertised, thirty-eight U. S. job applicants responded and were referred to the Employer, which reported on August 29, 1995, that it did not hire any of them. Analysis indicated that many of the candidates were qualified as to education, experience, and language fluency; a large number were qualified as to education and experience, but did not meet the language requirement; and others were fully qualified except as to the experience requirement. AF 64-69. This led the referring State agency to advise that qualified U. S. workers were available for the position offered. AF 68-69.

**Notice of Findings**. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated April 16, 1996. AF 71-75. Citing 20 CFR §§ 656.21(b)(2), 656.20(b)(6), and 656.21(b)(8), the CO found that the Employer had failed to offer sufficient evidence to justify its special job requirement of fluency in the Chinese language and that at least seven qualified U. S. workers were rejected for reasons that were neither lawful nor job related. See AF 70-72.

(1) The CO observed that, while the Employer's business and the accounting job duties were clearly set forth, the relevance of a foreign language to this position in the context of its business was not clear, and that Employer's discussion of this issue in its letter of March 3, 1995, was "not conclusive."[5] The CO then said the Employer could delete the Chinese language requirement or prove its business necessity under 20 CFR § 656.21(b)(2)(i). Explaining that the Employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the Employer's business and are essential to perform the job in a reasonable manner the CO itemized the specific facts that the Employer was directed to document to prove the business necessity of fluency in the Chinese language in this case. AF 72-73.

(2) The CO then discussed in detail the job qualifications and the Employer's rejection of the candidacies of U. S. workers Tiene, Shieh, Shen, Yang, Leung, Xing, and Cheung, all of whom were qualified as to education, experience, foreign language fluency, and availability for the position offered. In each instance the CO stated the reasons for questioning the *bona fides* of the Employer's recruitment effort.

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[4]As this appears to have been initialed by Ms. Tseng on November 1, 1995, it is assumed to be a correction of a document that Atty Fanta signed on October 11, 1994.

[5]The Employer then contended that, "If we were not permitted to employ for this position of financial analyst a person who possesses the ability to communicate fluently in the Chinese Mandarin language, we would then be required to employ a separate translator and interpreter solely and exclusively for the purpose of translating written and verbal communications to and from English and the Chinese Mandarin language. We are not in a position where we can afford such an unnecessary personnel expense." AF 10-12. This quotation was found in AF 11, and it was repeated as part of the Rebuttal at AF 93. The panel observes that, notwithstanding this explicit admission by the Employer, the CO did not at this point address the Employer's combination of duties to which 20 CFR § 656.21(b)(2) also applies.

**Rebuttal**. The Employer's June 18, 1996, rebuttal addressed the issues stated in the NOF. AF 76-94. As to the foreign language requirement, the Employer explained that it is engaged in originating, promoting and executing real estate investment transactions in the People's Republic of China, Hong Kong, and the Republic of China. Employer asserted that it derived nearly eighty per cent of its business volume and its gross income of about two million dollars from such real estate construction and development and related joint projects with overseas Chinese companies. Contending that its business transactions required the active use of documentation in Chinese, the Employer said, "Our company is not in a position at the present time where we can afford the unnecessary personnel expenses of a translator to accommodate the needs of an accountant who is not fluent in the Chinese language." Employer estimated that annually this employee would engage in communication with twenty to thirty persons who were "not fluent in the English language" and who rely on written and/or spoken Mandarin Chinese as their principal form of communication.[6] AF 92-93. As to the seven U. S. job applicants mentioned in the NOF, the Employer added to the reasons it gave for ejecting each of them. After discussing the reasons for rejecting the other candidates, the employer acknowledged that Ms. Cheung was qualified for the position in every aspect other than perceived deficiencies in her capacity to communicate in Mandarin Chinese. The rest of the rebuttal consisted of seven pages in what is assumed to be Chinese language characters. AF 78-86.

**Final Determination**. The CO denied certification in the Final Determination issued on July 18, 1996. AF 96-100.

Noting the Employer's rebuttal, the CO observed that the NOF required the Employer to file documentary evidence to substantiate its argument that fluency in the Chinese language was a business necessity and that the relevance of a foreign language to this position is not clear in the context of the Employer's business. The Employer's representations as to its business necessity were not supported by evidence clearly demonstrating that a significant portion of the business papers with which it deals required facility in the Chinese language. Moreover, because the Employer failed to provide evidence to support its allegations of the percentages of time the employee would spend in using the Chinese language, the extent of communication with persons in Chinese speaking countries is unproven and the relevance to this job offer of the foreign language documents appended to the rebuttal is unclear.[7] Finally, as the Employer's general

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[6] At one point Employer estimated that the employee would use written or spoken Chinese during fifty to sixty per cent of the time, and said the absence of the fluency it required in this employee would lead to "a serious and significant breakdown in the communications of our financial personnel with their overseas counterparts in Asia," which would disrupt its operations and lead to a loss of business. A few lines later the Employer estimated that the employee would use the Chinese language twenty to thirty per cent of the time in "handling, processing or otherwise analyzing Chinese language documents" and another twenty to thirty per cent of the time in communicating with people in Chinese speaking countries concerning various aspects of its real estate construction and development projects. AF 92.

[7] Examples of the type of evidence Employer could have filed included but were not limited to written instruments for the purchase of materials and equipment, and for the payment of taxes and wages.

remarks as to the expected adverse impact on its business of this employee's lack of fluency in Chinese remain unsupported by fact, the CO then said that the, "Employer did not submit any other documentation which clearly shows that fluency in the Chinese language is essential to employer's business and to this position." AF 98-99.

The CO further discussed the Employer's rejection of the seven named U. S. workers noting that the reasons for finding each of them qualified were discussed in the NOF. The CO explained that the direction that Employer document the rejection of these workers required specific details because in all instances there were conflicting statements as between the Employer and the applicants. Consequently, Employer was required to prove by objective evidence the specific details any interview conducted, including the dates, times, places, methods or types of interview, and the identity of the person with authority to hire who acted in the Employers behalf in conducting each interview. As to candidates Tiene, Shieh, and Shen, the data demanded was duly presented but was unsupported by objective evidence. The Rebuttal data as to candidate Yang corroborated the applicant's statements that the Employer's contact was untimely. The CO then found that the Rebuttal had failed to demonstrate that either of them was not qualified for the job and rejected Employer's evaluation of them. Lastly, the CO observed that Employer's claim that Ms. Cheung specifically stated Chinese fluency in the resume, that the Employer's rejection for lacking Mandarin was initially asserted in error, and that the unidentified "writing test" was disclosed for the first time in the rebuttal. While observing that these reasons might be sufficient to support finding rejection of this U. S. worker unpersuasive, the CO concluded that, "In any case, Chinese fluency is not recognized as a minimum requirement for this application (see above); and this US candidate remains otherwise qualified." AF 96.

**Appeal**. Following the denial of certification, on August 19, 1996, the Employer requested reconsideration of the Final Determination, submitting "further and additional documentation setting forth the requirement for fluency in the Chinese language as a minimum condition for eligibility for employer in this position that was not available to the employer at the earlier time." The Employer also transmitted documentation it "recently received" from the telephone company to establish that it had contacted and interviewed each of the U. S. job applicants. AF 126. The Employer then enclosed and attached several sheets of billing data that were not connected up with any of the U. S. applicants, and it also attached English language invoices from firms in Taipei and Macau that were not accompanied by explanations or related to the issues in this case. AF 102-114. The CO denied reconsideration on grounds that motions for reconsideration will only be entertained with respect to issues that could not have been addressed in the rebuttal, citing **Harry Tancredi**, 88 INA 441.

## Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, it must comply with the Act and regulations when employer seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. This is particularly the case where, as in this application, the

employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2)(C), a regulation adopted to implement the relief granted by the Act, which provides that the job offer shall not include the capacity to communicate in a language other than English as a hiring criterion unless that requirement is adequately documented as arising from business necessity. The Board held in **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), that proof of business necessity under this subsection requires the employer to establish that (1) the foreign language requirement bears a reasonable relationship to the occupation in the context of its business and (2) the use of that foreign language is essential to performing in a reasonable manner the job duties described in its application for alien labor certification. In proving the first prong of this test, it is helpful to show the volume of the employer's business that involves foreign language speaking customers or its business usage of that language. This is demonstrated with proof as to the customers, co-workers, or contractors who speak the foreign language and the percentage of the employer's business that involves that language. In the context of the instant case, the second prong invites evidence that the employee communicates or reads in the foreign language while performing the job duties.

Business necessity is not proven under the first prong where the percentage of customers who speak the foreign language is small. **Felician College**, 87 INA 553 (May 12, 1989)(*en banc*). That share of employer's affected business must equal a percentage that is significant. **Raul Garcia, M.D.**, 89 INA 211 (Feb. 4, 1991). In **Washington International Consulting Group**, 87 INA 625 (Jun. 3, 1988), however, the Board held that a foreign language was not a necessity where only twenty-three per cent of the client base was affected by the employer's foreign language requirement. Both prongs of the **Information Industries** test must be met, however. Simply proving that a significant percentage of the employer's customers speaks the foreign language is not sufficient to establish business necessity under this subsection, unless the employer also proves the existence of a relationship between the customers' use of that foreign language and the job to be performed. In **Coker's Pedigree Seed Co.**, 88 INA 048 (Apr. 19, 1989)(*en banc*), and in **Hidalgo Truck Parts, Inc.**, *supra*, business necessity was established by evidence of significant customer dependence on Spanish-speaking employees. In **Splashware Company**, 90 INA 038 (Nov. 26, 1990), where the employer did show that a significant percentage of its clientele spoke the foreign language, the Board found that business necessity was not proven because there was no relationship proven between the customers' use of the foreign language and the job to be performed. That is the point on which the denial of this application must be sustained.

The CO's reasoning in the instant case was reviewed with the holdings in precedents cited above. This CO was not persuaded because the Employer's arguments as to the business necessity for an Accountant who was fluent in written and spoken Chinese turned entirely on assertions of facts that were unsupported by objective evidence. Based on its examination of the Appellate File, the Panel agrees that the Employer's rebuttal evidence failed to sustain the burden of proving its business necessity because the documentation is vague and incomplete. **Analysts International Corporation**, 90 INA 387 (Jul. 30, 1991).

Even if the data underlying Employer's arguments were found credible, the evidence it offered did not demonstrate a need to communicate in the required foreign language in business transactions that was so frequent and so continuous as to affect the performance of the worker's duties as an Accountant. Compare **International Student Exchange of Iowa, Inc.**, 89 INA 261 (Apr. 30, 1991), *aff'd*, 89 INA 261 (Apr. 21, 1991)(*en banc*)(*per curiam*). Moreover, the evidence of record---including the documents that the Employer filed with its motion for reconsideration---supports the CO's finding that fluency in Chinese was not a minimum requirement for the performance of the job duties described in ETA Form 750A.

It follows that the Appellate File supports the conclusion that the Employer failed to establish that it is not feasible to hire a U. S. worker without the foreign language job requirement of its application. Consequently, the Certifying Officer's denial of alien labor certification is supported by sufficient evidence and should be affirmed, and the following order will enter.

## ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW**: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.